

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JOSHUA FORSTER,

Plaintiff,

v.

STEPHANIE CLENDENIN, et al.,

Defendants.

Case No.: 1:22-cv-01191-ADA-CDB (PC)

**ORDER DENYING WITHOUT  
PREJUDICE PLAINTIFF'S REQUEST  
FOR A COURT ORDER RE SUBPOENAS**

(Doc. 29)

Plaintiff Joshua Forster is a civil detainee proceeding pro se and *in forma pauperis* in this civil rights action brought pursuant to 42 U.S.C. § 1983. This action proceeds against Defendants Clendenin and Price for violations of Plaintiff's Fourteenth Amendment rights and related state law violations.

**I. RELEVANT PROCEDURAL BACKGROUND**

On July 24, 2023, this Court issued its Order Referring Case to Post-Screening ADR and Staying Case for 90 Days. (Doc. 17.) While Plaintiff indicated a willingness to participate in an early settlement conference (Doc. 18), Defendants opted out (Doc. 26).

On September 13, 2023, the Court lifted the previously imposed stay (Doc. 27) and issued its Discovery and Scheduling Order (Doc. 28).

On September 22, 2023, Plaintiff filed a document titled "Request For A Court Order: Ex Parte." (Doc. 29.)

1                   **II. DISCUSSION**

2 Plaintiff seeks an order directing the “Clerk of the Court to issue six (6) subpoenas, signed  
 3 and stamped by the Clerk and sent to the Plaintiff.” (Doc. 29.) Plaintiff further seeks an “order for  
 4 the U.S. Marshall’s Service to serve the Subpoenas to the appropriate party” and that “the order  
 5 be good through the duration of this matter.” (*Id.*) Lastly, Plaintiff requests “the Court provide the  
 6 Plaintiff with the U.S. Marshall’s Service address.” (*Id.*)

7                   Although Plaintiff does not reference any specific rule in the Federal Rules of Civil  
 8 Procedure, the Court construes his request to arise under Federal Rule of Civil Procedure 45.

9                   Federal Rule of Civil Procedure 45<sup>1</sup> governs subpoenas, which are the mechanism for  
 10 obtaining discovery and testimony from non-parties. A subpoena may be issued by the Court, the  
 11 Clerk of Court, or an attorney as an officer of the Court for witnesses and documents found  
 12 within its jurisdiction. *See Fed. R. Civ. P. 45(a)(2), (3).* Although Rule 45(a)(3) provides that  
 13 “[t]he clerk must issue a subpoena, signed but otherwise blank, to a party who requests it,”  
 14 Plaintiff has not provided enough information for the Court to grant his request.

15                   Rule 26(b)(1) establishes the scope of discovery, stating in pertinent part:

16                   Parties may obtain discovery regarding any nonprivileged matter that  
 17 is relevant to any party’s claim or defense and proportional to the  
 18 needs of the case, considering the importance of the issues at stake  
 19 in the action, the amount in controversy, the parties’ relative access  
 20 to relevant information, the parties’ resources, the importance of the  
 discovery in resolving the issues, and whether the burden or expense  
 of the proposed discovery outweighs its likely benefit. Information  
 within this scope of discovery need not be admissible in evidence to  
 be discoverable.

21 Fed. R. Civ. P. 26(b). These standards mean that the Court may grant a request by Plaintiff to  
 22 issue a Rule 45 subpoena to a properly identified non-party to discover information that is  
 23 relevant to the party’s claims or defenses, is not burdensome, and is not within Plaintiff’s  
 24 reasonable access, upon a sufficient showing of the importance of the information.

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25                   <sup>1</sup> Rule 45 of the Federal Rules of Civil Procedure permits issuance of subpoenas to obtain  
 26 discovery from non-parties equivalent to discovery from parties under Rule 34. *See Adv. Comm. Note to*  
 27 *1991 Amendment to FRCP 45.* Rule 34 governs discovery of designated documents, electronically stored  
 28 information, and designated tangible things subject to the provisions of Federal Rule of Civil Procedure  
*26(b).* *Meeks v. Parsons*, No. 1:03-cv-6700-LJO-GSA, 2009 WL 3003718, at \*2 (E.D. Cal. Sept. 18,  
 2009) (citing *Fahey v. United States*, 18 F. R. D. 231, 233 (S.D.N.Y. 1955)).

Plaintiff has specified he wants six subpoenas. (Doc. 29.) However, Plaintiff has failed to indicate to whom he intends to direct the subpoenas. Plaintiff has also failed to indicate whether he is seeking documents, testimony, or both from the non-parties<sup>2</sup> to be served with the subpoenas. Nor has Plaintiff made any showing of relevancy of the information sought as it relates to his claims or the importance of that information. It is also unclear—if Plaintiff is seeking documents only—whether the documents sought from the non-party are equally available to Plaintiff and are not obtainable from Defendants through a request for the production of documents. *See Fed. R. Civ. P. 34.* Simply put, more information is required.

9 Plaintiff must identify the individuals he intends be served with the Rule 45 subpoenas he  
10 seeks. He must identify what testimony or documents he is seeking from each individual  
11 identified. If Plaintiff seeks documents only, Plaintiff must also make a showing that the  
12 discovery he seeks from third parties or non-parties cannot be obtained from Defendants through  
13 a request for production of documents. *See Hazeltine v. Young*, No. 18-16565, 793 Fed. App'x  
14 647, 648 (9th Cir. 2020) (“The district court did not abuse its direction by requiring that Hazeltine  
15 seek discovery from the defendants before the court would issue subpoenas ...”).

“Expenditure of public funds [on behalf of an indigent litigant] is proper only when authorized by Congress ....” *United States v. MacCollom*, 426 U.S. 317, 321 (1976). A plaintiff who proceeds *in forma pauperis* is “generally entitled to obtain service of a subpoena duces tecum by the United States Marshal. 28 U.S.C. § 1915(d).” *Heilman v. Lyons*, No. 2:09-cv-2721 KJN P, 2010 WL 5168871, at \*1 (E.D. Cal. 2010).<sup>3</sup> However, Plaintiff is obligated to pay witness fees and/or costs and to tender payment concurrently with the subpoena. See *Tedder v. Odel*, 890 F.3d 210, 211-212 (9th Cir. 1989) (IFP status of civil rights plaintiff did not exempt him from requirement that witness fees be tendered with subpoena). And witness fees cannot be waived. *Id.*

<sup>24</sup> Subpoenas duces tecum generally apply to non-parties (i.e., “persons”) as opposed to parties, like the Defendants. See Fed. R. Civ. P. 45(a); C. Wright & A. Miller, *Federal Practice and Procedure* § 2107 (“Though the rules do not say so expressly, a subpoena is not necessary if the person [from whom documents are sought] is a party”). Indeed, the Federal Rules of Civil Procedure specifically provide a separate mechanism for obtaining document discovery from other parties by serving a document request on them. See Fed. R. Civ. P. 34.

<sup>3</sup> “As a general rule, indigent litigants bear their own litigation expenses.” *Tabron v. Grace*, 6 F.3d 147, 159-160 (3d Cir. 1993). 3

1 In other words, while Plaintiff is *not required* to pay for the United States Marshal’s service *to*  
 2 *serve* his subpoenas, he is required to pay witness fees and/or costs to a witness entitled to them.  
 3 *See, e.g., Badman v. Stark*, 139 F.R.D. 601, 604 (M.D. Pa. 1991) (holding that an indigent  
 4 plaintiff seeking issuance of a subpoena must simultaneously tender the witness fees and the  
 5 estimated mileage allowed by law with the service of the subpoena); *Cortinas v. Vasquez*, No.  
 6 1:19-cv-00367-JLT-SKO, 2022 WL 837377, at \*2 (E.D. Cal. Mar. 21, 2022) (same). Briefly  
 7 stated, service of a properly issued subpoena duces tecum in a civil rights action brought by a pro  
 8 se prisoner proceeding IFP will be served at no expense to the prisoner by the USMS. However, if  
 9 the subpoena involves the testimony of a witness, rather than the production of documents, the  
 10 prisoner plaintiff must pay any associated witness fees and costs and provide those fees and costs  
 11 prior to service.

12 To the extent Plaintiff requests the subpoenas “be good through the duration of this  
 13 matter,” that request is inappropriate. The Discovery and Scheduling Order provides deadlines for  
 14 the completion of discovery. And discovery will conclude prior to any dispositive motion or trial  
 15 proceedings that may be held in this matter. Hence, any subpoena that may issue in this action  
 16 will not be “good through the duration of this matter.” It would be valid during the discovery  
 17 period only.

18 To the extent Plaintiff requests this Court “provide the Plaintiff with the U.S. Marshall’s  
 19 Service address,” the request is not necessary. Should the Court issue Rule 45 subpoenas in this  
 20 action, the Court will direct service by the United States Marshal after it has determined Plaintiff  
 21 has made the required showings and Plaintiff has been directed to complete and return the  
 22 appropriate Rule 45 subpoenas to the Court. *See, e.g., Modica v. Russell*, No. 2:15-cv-00057  
 23 MCE AC PS, 2015 WL 13653879, at \*2 & n.1 (E.D. Cal. Sept. 18, 2015) (where plaintiff made  
 24 the required showings, “the court will direct the Clerk of Court to issue” the subpoena and  
 25 plaintiff “must complete the subpoena and return it to the court to obtain personal service … by  
 26 the United States Marshal”); *see also Heilman*, 2010 WL 5168871, at \*2.

27 In sum, assuming Plaintiff is seeking documents rather than testimony,<sup>4</sup> a request for the  
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<sup>4</sup> The Court makes this assumption because there are ~~no~~ scheduled hearings in this matter at which

1 issuance of a records subpoena requires Plaintiff to: (1) set forth the specific documents requested  
2 and from whom; (2) demonstrate that the documents are only obtainable through the third party;  
3 and (3) establish the relevance of the requested documents to any claim or defense. Plaintiff's  
4 instant motion will be denied without prejudice. Plaintiff may submit a motion seeking the  
5 issuance of Rule 45 subpoenas demonstrating the issuance of such subpoenas meets the  
6 requirements discussed in this order.

7 **III. CONCLUSION AND ORDER**

8 Accordingly, for the reasons stated above, **IT IS HEREBY ORDERED** that the  
9 Plaintiff's "Request For A Court Order: Ex Parte" (Doc. 29) is **DENIED** without prejudice.  
10 IT IS SO ORDERED.

11 Dated: September 25, 2023

  
12 UNITED STATES MAGISTRATE JUDGE

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26 testimony might be offered. To the extent Plaintiff did intend to seek a non-party's testimony, Plaintiff is  
27 required to identify the time and place of such testimony, and if testimony is to be given at a deposition, he  
28 must state the method for recording the testimony. *See Fed. R. Civ. P. 45(1)(A)(iii), and (1)(B).* Further,  
Plaintiff must pay the related witness fees and costs in advance. *Tedder*, 890 F.3d at 211-212.